IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

PAULA JO WHITMIRE — PLAINTIFF

V. — NO. 1:97CV321-B-A

VICTUS LIMITED d/b/a MASTER DESIGN FURNITURE — DEFENDANT

Memorandum Opinion

This cause comes before the court on the defendant's motion for summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

I. INTRODUCTION

The amended complaint alleges that the plaintiff was removed from the position of the human resources representative and ultimately discharged in violation of the Family and Medical Leave Act [FMLA], 29 U.S.C. § 2601, et seq. and the anti-discrimination provisions of the Americans with Disabilities Act [ADA], 42 U.S.C. § 12112. The amended complaint further alleges harassment and discharge in violation of the anti-retaliation provision of the ADA, 42 U.S.C. § 12203(a). The following pendent state claims are alleged: assault,[1] intentional infliction of mental distress and violation of good faith obligations in employment and contractual relationships. The defendant moves for summary judgment on all claims.

The plaintiff does not address the FMLA claims in her response and apparently does not

[1]The plaintiff alleges that the defendant failed to protect her from an assault by the defendant's plant manager, William Lamb.

oppose the motion with respect to those claims.[2] The defendant articulated a legitimate reason for discharging the plaintiff on the ground that she failed to return to work upon expiration of 12 weeks of FMLA leave for depression. See 29 U.S.C. § 2612(a) ("an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period...."). In adddition, the defendant articulated a legitimate reason for reassigning the plaintiff upon her return from a previous leave for a foot condition[3] and the plaintiff has presented no evidence that the reason for her reassignment was related to her leave. The court finds that since the plaintiff has failed to present any evidence creating a genuine issue of material fact as to discrimination under the FMLA the defendant is entitled to summary judgment as to the FMLA claims.

II. FACTS

The following facts are undisputed. In February, 1993 the plaintiff was employed by the defendant as a clerical employee at its furniture manufacturing plant. In April, 1994 the plaintiff, as safety coordinator, was injured while inspecting the assembly area; she fell approximately four feet from the conveyor belt and landed flat-footed on a concrete floor. She sustained permanent damage to connective tissue from the heel to the ball of her feet, causing chronic pain as a result

[2]Exclusive of the pendent state claims, the plaintiff contends the there are genuine issues of material fact only as to the ADA anti-discrimination and anti-retaliation claims.

[3]Although the plaintiff's leave for her foot condition was not formally designated as FMLA leave, the defendant admits that the plaintiff was entitled to protection under the FMLA upon her return to work. The defendant has presented evidence that, prior to the first day of her leave and without knowledge that the plaintiff would take leave for her foot condition, it had decided to reassign the plaintiff to the receptionist position for performance reasons and that upon learning of her walking/standing restriction during her leave, the defendant decided to reassign the plaintiff to the newly created position of data entry clerk.

of standing and walking. In September, 1995, the plaintiff had unsuccessful surgery on the left foot. In February, 1996 the plaintiff was promoted to the position of human resources representative and received a 16% pay raise. In August, 1996 the plaintiff's physician restricted her standing and walking to one to two hours per day, and in October, 1996 an orthopedic surgeon told the plaintiff that her foot injuries were permanent, restricted her standing and walking to one hour per day and referred her to a specialist. The plaintiff took medical leave from November 21, 1996 until February 10, 1997 for further treatment and experimentation with casts and boot walkers. Upon her return to work, the plaintiff was reassigned to a newly created position of data entry clerk[4] in an office temporarily equipped with a disconnected computer and a broken chair; her office initially had no phone. Following complaints from the plaintiff, the defendant increased her job duties and improved her office conditions and equipment. Her salary and benefits were not reduced. The defendant had placed the receptionist, Judith Skinner, in the human resources position. On February 28, 1997, the plaintiff filed an EEOC charge alleging discrimination because of her foot disability in her removal from the human resources position.

Danny Robinson became the plaintiff's supervisor in October, 1996 prior to her first medical leave and remained the plaintiff's supervisor after her reassignment. As a result of a disciplinary dispute when she was the human resources director, the plaintiff proclaimed that her friendship with Robinson had ended. After her reassignment, the plaintiff complained that Robinson refused to speak to her and gave her orders through an hourly employee. She suffered depression and took medical leave on April 21, 1997. Her family physician initially advised the

[4]The plaintiff refers to the job title as data management assistant. Richard Mihalik, the defendant's vice president, testified in his deposition that the new job position was designed to assist managers with overflow paperwork involving minimal walking.

defendant that she needed medical leave until May 17, 1997. In a notice dated May 21, 1997 the physician advised the defendant that the plaintiff would be unable to return to work until June 22, 1997. On May 30, 1997 Richard Mihalik, vice-president of Master Design Furniture, sent the plaintiff written notice that her leave would be calculated according to company policy regarding FMLA leave allowance.[5] In a notice dated June 23, 1997, the plaintiff's physician advised the defendant that the plaintiff "[c]ontinues to be unable to work due to depression. We'll recheck in 1 month." The plaintiff at no time responded to the defendant's notice or contacted the defendant to request an extension in excess of the 12-week allowance. Mihalik sent the plaintiff a written notice of termination dated July 15, 1997, five days after the expiration of a 12-week leave period.[6] On August 29, 1997 the plaintiff filed an EEOC charge alleging harassment in retaliation for filing the first EEOC charge and discharge in violation of the ADA.

III. LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'... that there is an absence of evidence to support the nonmoving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the nonmovant to "go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,'

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[5]A copy of the defendant's company policy was enclosed with the written notice to the plaintiff.

[6]The notice stated in part:

> Since you did not return to work or otherwise contact us we have filled your position of Data Management Assistant on a regular basis.

designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Rule 56(e). All legitimate factual inferences must be drawn in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986); Matagorda County v. Russell Law, 19 F.3d 215, 217 (5th Cir. 1994). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the nonmovant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986); Fed. Sav. & Loan Ins. v. Kralj, 968 F.2d 500, 503 (5th Cir. 1992).

A. DISCRIMINATION

The defendant contends that the plaintiff was not protected under the ADA. 42 U.S.C. § 12112(a) provides:

> No covered entity shall discriminate against **a qualified individual with a disability** because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(Emphasis added). The Fifth Circuit has held:

> To prevail under the ADA, the plaintiff must prove three things: (1) she has a disability; (2) she is an otherwise qualified employee; and (3) she suffered an adverse employment decision solely because of her disability.

Rizzo v. Children's World Learning Centers, Inc., 173 F.3d 254, 260 (5th Cir. 1999). 42 U.S.C. § 12111(8) provides in pertinent part:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the **essential functions** of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential....

(Emphasis added). To avoid summary judgment on the issue of qualification under the ADA, the plaintiff must show:

> 1) that [she] could perform the essential functions of the job in spite of [her] disability or 2) that a reasonable accommodation of [her] disability would have enabled [her] to perform the essential functions of the job.

Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1093 (5th Cir. 1996) (citing Chandler v. City of Dallas, 2 F.3d 1385,1393) (5th Cir. 1993) (identifying "essential functions" as "functions that bear more than a marginal relationship to the job at issue").

The defendant does not dispute that at the time of her reassignment upon her return from leave in February, 1997 and at the time of her discharge the plaintiff had a foot disability within the purview of the ADA.[7] The threshold issue is whether the plaintiff was able to perform "the essential functions" of the human resources position. The plaintiff states in her declaration[8] that her job as the human resources representative "required substantial amounts of time walking." Similarly, Judith Skinner testified in her deposition that the human resources job required her to

[7]The term "disability" under the ADA includes a physical impairment "that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). "'Major life activities means functions such as caring for oneself, performing manual tasks, walking, seeing hearing, speaking, breathing, learning, and working.'" Hamilton v. Southwestern Bell Tel. Co., 136 F.3d 1047, 1050 & n. 8 (5th Cir. 1998) (quoting 29 C.F.R. § 1630.2(i)).

[8]The document styled as the plaintiff's affidavit is in fact an unsworn declaration under penalty of perjury which has the effect of an affidavit pursuant to 28 U.S.C. § 1746.

be on her feet approximately four hours a day[9] as follows: At least two or three times a day, Skinner walked to two mailboxes[10]; she walked into the plant from her office twice a day to retrieve time cards[11]; walking was involved in interacting with job applicants[12]; and she often walked into the plant to meet with supervisors and managers.[13] However, the plaintiff states in her declaration: "[W]hen I was given the meaningless job, Judy Skinner did the Human Resources job with other employees doing all of the walking duties that had been formerly required of the Human Resources Director." The plaintiff contends that the delegation of "walking duties" to other employees indicates that the defendant did not consider such duties an essential function of the human resources position, and that the defendant could have similarly accommodated the plaintiff. The court finds that the general reference to "all walking duties" and "other employees" in the plaintiff's declaration carries no greater weight than an unsubstantiated allegation and thus inadequately contradicts Skinner's deposition testimony regarding her specific walking duties totaling approximately four work hours per day. The plaintiff's assertion falls short of delineating how Skinner's walking duties were eliminated or even reduced and thus does not create a genuine fact issue.

The defendant owed no duty to the plaintiff to eliminate or reduce the walking duties of the human resources position. The reasonable accommodation provisions of the ADA do not

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[9]*See* Skinner's deposition at 81.

[10]*See* Skinner's deposition at 78.

[11]*See* Skinner's deposition at 21-22, 95.

[12]*See* Skinner's deposition at 21-22.

[13]*See* Skinner's deposition at 29.

encompass the elimination or reallocation of any **essential function** of an employee's job. Newman v. Chevron U.S.A., 979 F. Supp. 1085, 1091 (S.D. Tex. 1997) (citing Bradley v. Univ. of Texas M.D. Anderson Cancer Center, 3 F.3d 922, 925 (5th Cir. 1993), cert. denied, 510 U.S. 1119, 127 L. Ed. 2d 389 (1994)). Otherwise, the statutory definition of a qualified individual, i.e., a disabled person who, **with or without reasonable accommodation**, can perform the **essential functions** of a job, would be rendered meaningless. The court finds that walking is an essential function of the human resources position and that the plaintiff has failed to provide any evidence of a reasonable accommodation which would have allowed her to perform that essential function. Therefore, the plaintiff is not "an otherwise qualified employee" protected under the ADA with respect to her foot disability. Accordingly, the defendant is entitled to summary judgment as to all ADA discrimination claims based on the plaintiff's foot disability.

The plaintiff alleges that she was discharged because of her depression or her record of depression during her second medical leave. See 42 U.S.C. 12102(2)(A),(B) (disability includes "mental impairment that substantially limits one or more of the major life activities" or a "record of such an impairment"). In determining whether an impairment is substantially limiting, the court must consider

> (1) the nature and severity of the impairment, (2) its duration or expected duration, and (3) its permanent or expected permanent or long-term impact.

Hamilton v. Southwestern Bell Tel. Co., 136 F.3d 1047, 1050 & n.6 (5th Cir. 1998)(citing 29 C.F.R.1630.2(j)). "[W]orking at a particular job of [one's] choice" is not a major life activity under the ADA. Dupre v. Harris County Hospital Dist., 8 F. Supp. 2d 908,917 (S.D. Tex. 1998) (citations omitted)(bipolar disorder and the side effects of plaintiff's prescribed medication did

not constitute a covered impairment). It is undisputed that the plaintiff's depression was temporary and related to her particular job situation. Her family physician testified in his deposition that the plaintiff was suffering short-term reactionary depression. The court finds that the plaintiff's work-related depression resulting in a twelve-week medical leave does not constitute a substantially limiting mental impairment or record of such an impairment. With respect to her depression, the plaintiff was not a disabled employee under the ADA. Therefore, the plaintiff cannot establish discriminatory discharge based on her depression or record of depression.

B. RETALIATION

In retaliation cases, the plaintiff has the ultimate burden of proving that the adverse employment action would not have occurred but for her filing of the first EEOC charge. Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1092 (5th Cir. 1995) ("we find insufficient evidence to support a finding that 'but for' Mayberry's protected activity, he would not have received the 13-day suspension") (citing Jack v. Texaco Research Center, 743 F.2d 1129, 1131 (5th Cir. 1984) (the employee must prove "causation-in-fact or 'but for' causation" between the protected activity and the adverse employment decision)).[14] The plaintiff's admission that Robinson's harassment was in part the result of personal animosity arising before the filing of her first EEOC charge and his frustration regarding his affair with a co-employee defeats her retaliatory harassment claim.

In support of her retaliatory discharge claim, the plaintiff erroneously asserts that she was

[14]"Discrimination and retaliation are tied with causation in the **ultimate burden** on the plaintiff to prove that she was the victim of prohibited conduct." Jack v. Texaco Research Center, 743 F.2d 1129, 1131 (5th Cir. 1984) (emphasis added).

discharged "only a few weeks" after the filing of her first EEOC charge. In fact, the plaintiff was discharged more than four months after she filed the first EEOC charge. See Mayberry, 55 F.3d at 1092 ("The timing of the adverse employment action can be a significant, although not necessarily determinative, factor."). Assuming arguendo that the four-month lapse raises an inference of a causal connection,[15] the defendant has articulated a legitimate, nonretaliatory reason for the plaintiff's discharge–the plaintiff's failure to return to work when her FMLA leave expired. Therefore, the plaintiff must prove that the defendant would not have discharged her upon the expiration of her leave had she not filed the first EEOC charge.

The plaintiff argues that three other employees were granted workers' compensation leave, thereby bypassing the 12-week limitation applicable to medical leave under the FMLA. The plaintiff's declaration identifies three employees--Roger Mills, Earl Baker and Joe Perkins--whose employment allegedly continued after exceeding "twelve weeks of leave." Mihalik's second declaration dated February 10, 1999 states that Perkins, Mills and Baker did not take workers' compensation leave. His declaration, ¶ 6, erroneously states that the plaintiff's "affidavit"[16] states otherwise; the plaintiff merely states that the named employees were not on FMLA leave. She states in her deposition and declaration that she should have been granted workers' compensation leave during her absence for her job-related stress and depression[17] but does not explicitly state that the named employees were on workers' compensation leave.

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[15]As noted supra, the plaintiff erroneously asserts a lapse of "a few weeks."

[16]*See* note 8 supra.

[17]The plaintiff contends that her depression was related to her workers' compensation claim for her foot injury.

Therefore, the plaintiff does not raise a genuine issue as to disparate treatment regarding allowance of leave. Even if the court liberally construes the plaintiff's testimony, other employees' workers' compensation leave is not material to the issue of the plaintiff's entitlement to workers' compensation leave for depression and stress.

The defendant granted the plaintiff the maximum 12-week period of medical leave mandated by the FMLA. When advised by the plaintiff's physician that she would be unable to return to work for a second 30-day period, the defendant notified the plaintiff in writing that her leave allowance was subject to the FMLA and furnished her a copy of the company policy on FMLA leave. The plaintiff did not request an extension of her leave allowance or otherwise respond to the notice even after her physician advised the defendant that she would be unable to return to work for an indefinite period.[18] The alleged harassment by Robinson does not raise suspicion regarding the plaintiff's discharge since the plaintiff, as previously noted, began having interpersonal problems with Robinson several months before the EEOC filing. C.f., Shirley v. Chrysler First, Inc., 970 F.2d 39, 43 (5th Cir. 1992) ("We find it surprising that suddenly, after Shirley filed her EEOC complaint, problems with her work surfaced.").[19] In addition, the defendant's response to complaints the plaintiff made after the EEOC filing[20] is not consistent

[18]The plaintiff did not respond to any aspect of the defendant's notice, including the designation of her leave as FMLA leave, and did not contact the defendant after her discharge.

[19]The court in Shirley v. Chrysler First, Inc. affirmed the district court's judgment in favor of the plaintiff employee for retaliatory discharge. 970 F.2d 39, 43 (5th Cir. 1992).

[20]The defendant increased the plaintiff's job duties in her reassigned position as data management assistant and improved her office conditions. On March 7, 1997 Mihalik provided the plaintiff a job description. Regardless of the plaintiff's preference for the human resources job, her reassignment did in fact accommodate her foot condition.

with a retaliatory motive culminating in discharge. The court finds that the plaintiff has failed to present sufficient evidence to establish that, regardless of her failure to contact the defendant or to return to work when her FMLA leave expired, she would not have been discharged at that time but for her previous EEOC filing.

CONCLUSION

For the foregoing reasons, the court finds that the defendant's motion for summary judgment should be granted as to the federal claims and that the pendent state claims should be dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

An order will issue accordingly.

THIS, the ____ day of July, 1999.

NEAL B. BIGGERS, JR.
CHIEF JUDGE